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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VIACOM INTERNATIONAL, INC. et al.,

Plaintiffs,

v. 07 CV 2103 (LLS)

YOUTUBE, INC. et al.

Defendants.

THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED, et al.

Plaintiffs

v. 07 CV 3582 (LLS)

YOUTUBE, INC. et al.

Defendants.

New York, N.Y.

October 12, 2012
2:30 p.m.

Before:

HON. LOUIS L. STANTON,

District Judge

APPEARANCES

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(In open court)

THE COURT: Familiar faces. Welcome back.

Where do we stand? Mr. Schapiro?

MR. SCHAPIRO: Your Honor, the Second Circuit, after sending the case back, asked what we thought were four fairly clear questions or sent the case back for resolution of four discrete issues, and the Court then crystallized that even further in its letter to the parties of a few months ago.

The Second Circuit asked the Court to determine whether on the current record Youtube had knowledge or awareness of any specific infringement. We think that the plaintiffs have been given more than enough opportunity in the flurry of letters to point to some specific clips in suit of which Youtube had actual or red-flag knowledge. They haven't been able to muster it. They seem to want to be able to ignore the direction to point to specific infringements.

Second, the Second Circuit said that this Court should determine whether on the current record Youtube willfully blinded itself to specific infringements. Again, we'll rest on the letters here, but there's been a back-and-forth with many letters written, and the plaintiffs seem intent on trying to resurrect their general knowledge standard rather than answering the question posed by the Second Circuit and this court.

Third, the Second Circuit asked this Court to

determine whether Youtube had the right and ability to control infringing activity within the mean of Section 512(c)(1)(B), and, again, the parties have laid out their positions in letters before this Court, and we do not believe that the plaintiffs have made any showing that would allow them to survive a renewed summary judgment.

Then, finally, the Second Circuit asked this Court to determine whether any clips in suit were syndicated to a third party, and, if so, whether that syndication occurred by reason of storage at the direction of the user within the meaning of the statute.

In short, we've had this exchange, it seems like at the end of the day, we're still, to some extent, talking past each other, and, so, waiting for guidance from your Honor, because the Second Circuit said that after we've hashed some of this out, the Court should permit renewed motions for summary judgment as soon as practicable. That's from the Second Circuit decision.

We think now is practicable, and so we think that's where we need to go, but, of course, we would probably require some indication from your Honor as to which of us is understanding the Second Circuit's ruling accurately.

THE COURT: Baskin.

MR. BASKIN: Good afternoon, your Honor. I will also happily stand on the papers we presented to the Court in quite

detailed --

THE COURT: A little louder.

MR. BASKIN: We presented to your Honor quite detailed analysis of all four issues. Of course, it's in the context of summary judgment, so that, as your Honor knows, the standard is all evidence has to be weighed in favor of the plaintiffs for this purpose.

Our proposition to the Court -- and, again, I'm happy to stand on the papers we submitted, which goes into it in substantial detail, that this is not even a close case, and, from a summary judgment point of view, there is no chance, especially since the Second Circuit particularized that the issues, specifically the issues of willful blindness, and the issue of writing ability to control are factual issues which, in large measure, turn on issues of intent, so they are quintessentially issues that are not subject to summary judgment. We think that there's no chance of a summary judgment ruling here. We understand your Honor may well have to give them the opportunity to move for summary judgment. We will answer.

We think, as your Honor knows, however, we should not delay this case progressing in an orderly fashion towards trial, and at the same time that we brief summary judgment or they brief summary judgment, we believe your Honor should put us on a quite accelerated schedule, accelerated in the sense a

schedule with a clear trial date in mind; that we try to get to trial within the next nine, ten, eleven months; and that you have parties, obviously, with a lot of resources and a lot of availability here, and the parties are perfectly capable of proceeding on multiple tracks. So we believe, your Honor, we should have -- if summary judgment should proceed, let it proceed, but since we think the likelihood of anyone getting summary judgment on this record is, quite frankly, remote, particularly where issues of intent are the driving issues, your Honor should go further and should put us on an orderly path to trial.

THE COURT: Mr. Sims.

MR. SIMS: Your Honor, I largely agree with what Baskin had to say. I would add that in light of the way the Second Circuit approached these issues, class plaintiffs have concluded that they will not move for summary judgment. So that should make things easier. We understand Mr. Schapiro intends to, and we will, of course, respond.

We have indicated to the Court in the letters that there is a small amount of discovery that we do want on the issues that the Second Circuit left open for discovery. We don't see any reason why that can't be done consistent with --

THE COURT: Why hasn't it been done? It's been months since we met.

MR. SIMS: Your Honor --

THE COURT: There is no stay of discovery in effect.

MR. SIMS: It was our understanding that you had control over how we were going to proceed. You asked for these letter briefs. We think we can get our requests in within ten days or a week even and we don't see why that needs to interfere with the schedule that would otherwise be reached. We're prepared to --

THE COURT: Baskin, I take it you are complete on discovery?

MR. BASKIN: Your Honor, the only discovery we ask is -- the Second Circuit proposed that for reasons of the storage issue, that we have to identify which of our --

THE COURT: The syndication issue.

MR. BASKIN: Yes, the syndication issue.

-- which of our clips were in fact syndicated. It's a clear factual, easy factual inquiry. The only ones who have the record are Youtube. So, we just want their assistance in identifying which of our clips they in fact syndicated, so if your Honor concludes, as we think you will, that syndication remains a live issue for trial, we can identify which of our clips were in the process of being syndicated. Beyond that, we need no discovery, your Honor.

MR. SIMS: That, your Honor, is one of the --

THE COURT: Are you contemplating doing that discovery after the motions for summary judgment if they're denied, or is

there something you need for the motions for summary judgment?

MR. BASKIN: Either way, your Honor. We could do it after summary judgment once the motions, as we hope, are denied.

All we need for trial, we need to be able to identify -- if we prevail on the storage issue, as we think we will, for purposes of trial, we need to identify which of our clips are on their system. Only they have that information.

So, we are happy to wait and do that after the summary judgment briefing, or, frankly, I think it's discovery we can do simultaneously with the briefing. I think it will take 30 days tops to compile that data. I don't think it should be an issue that slows down the Court's schedule --

THE COURT: I would have thought that any necessary discovery would have been accomplished by this time by able counsel proceeding to get what they thought they needed, and if there was some objection to it or you thought it wasn't allowed, I'd hear about it.

MR. SIMS: Your Honor, given how things had been organized here, it never occurred to us that we were able to go forward with that. I think we would have had a response from Mr. Schapiro that the Court had concluded discovery years ago.

So, if I misunderstood, we're wrong, but we think it can be done expeditiously. There are only five pretty targeted matters that we want and we think if we can get responses back

within 45 days, it won't delay the briefing.

THE COURT: What's your response on discovery, Mr. Schapiro?

MR. SCHAPIRO: Your Honor, there were two years of discovery in this case, 30 million pages of documents exchanged, 148 depositions.

THE COURT: Oh, look, that was true before this Court of Appeals' opinion. The Court of Appeals wrote what it wrote bringing us up into the 21st Century.

What is your position on discovery with the next round of summary judgment briefing in view?

MR. SCHAPIRO: Our position is that on the syndication question, once we receive guidance from the Court about which party is understanding the Second Circuit's position on syndication correctly, that we should be able to answer a few interrogatories if Viacom wants to send them to us and show them, we think we can establish to their satisfaction that no clips in suit were manually delivered for syndication in the way that the Second Circuit was thinking. We can answer that question for them.

Mr. Sims in the class, in one of its earlier letters --

THE COURT: In other words, you want to apply the limiting word "manually?"

MR. SCHAPIRO: Yes, your Honor.

THE COURT: Baskin thinks that's immaterial.

MR. SCHAPIRO: That's why we think that before we start down the path of discovery, we would need your Honor to weigh in and clarify that issue. We think it's quite clear, but there is a gap between the parties.

THE COURT: And with respect to Mr. Sims?

MR. SCHAPIRO: Mr. Sims, as I understand it, based on one of the early letters they sent, wants to go into discovery about all sorts of things that have nothing to do with any clips in suit.

He wants to know about all these clips in the so-called Otto declaration that they submitted, none of which are clips in suit, all of which post date the time at issue in this case.

They were asking about things that we do in Germany in response to a German court order that's on appeal. So, our sense is that the class's proposed discovery is anything but targeted.

Viacom's request for discovery on syndication do seem targeted, and I'm sure if we meet and confer, assuming that your Honor gives us guidance that allows us to be talking about the same thing, I'm sure we can work out with Viacom targeted discovery with a schedule which presumably would be with the interrogatories.

THE COURT: Mr. Sims.

MR. SIMS: Your Honor, I have five items here. I would suggest that we propound them to Mr. Schapiro, and if he has a problem, we could try to work them out. Otherwise, we can come to you or to a magistrate. But they're five items. It's not millions of pages we're seeking. It's not lots of depositions we're seeking.

I do want to correct a misstatement that has been made twice, which the works identified in the Otto declaration are not in the lawsuit. To the contrary, they are exactly the same works in suit that we have been suing about for five years that we now find out are still sitting in Youtube never having been taken down and are sitting in Youtube-generated channels.

THE COURT: Why don't you ask they be taken down if you object to that?

MR. SIMS: Well, I would have thought, number one, that our letters were perfectly clear requests for those to be taken down. And, number two --

THE COURT: Excuse me? What was that?

MR. SIMS: The letters that we've sent make perfectly clear our position and identified precisely where they were. They comply with all of the requirements of --

THE COURT: Of notice.

MR. SIMS: -- of that. In addition, the point we're trying to make -- one of the points in the lawsuit is that once we send take-down notices, they have obligations. What they're

doing in Europe is they take the material identified in a take-down notice, they make a reference file of it, and exclude additional copies of that same work at the threshold. Our point is that's what they should be doing here.

The other declaration lists and provides links, if your Honor wanted to see them, to exactly the works that we have been suing about for five years that are still being distributed to the public by Youtube on channels which they admit -- because they create them -- are the most popular material available. They only create a channel when it's something that's particularly popular and interesting to people.

So, they are continuing to use the very works in suit. This is not about new works. We're not suing about new works. We understand the Court's ruling years ago on that point. But these are the same old things that are still being shown on Youtube, and, of course, we're allowed to talk about it in connection with summary judgment and point out that they have --

THE COURT: You say they appear on some list of works in suit that you have filed in this case.

MR. SIMS: Absolutely.

THE COURT: All right.

MR. SCHAPIRO: Your Honor, either unintentionally or artfully, Mr. Sims is conflating works in suit with clips in

suit, OK? What is at issue in this case are clips, and both this court and the Second Circuit made that clear. Every clip in suit -- the Second Circuit's decision says this; your Honor decided it. The record is closed on that. Every clip in suit has been taken down.

A work in suit is a show, a television show. So, the show might be Sponge Bob Square Pants or it's a particular episode of a show.

A clip is the excerpt that was posted to Youtube. So I need to make two things very clear. Every clip in suit was taken down before the Court issued its first summary judgment ruling in this case.

Second, as soon as they sent us the Otto declaration, we took down everything identified in the Otto declaration. They should have sent it to us years ago, but it ultimately doesn't matter because whatever they might say about what we're able to do in terms of identify -- let me back up for a moment. The class has always taken the position that we should extrapolate, and once we take down one version of something that belongs to them, we should find or identify other versions and take them down. That's what Mr. Sims is talking about here. And there is no reading of the Second Circuit's decision in which that would be relevant to any renewed summary judgment papers. So that discovery would all be for naught.

MR. SIMS: Your Honor, in the first place, most of

these re-posts are not different versions. They are the same audio or the same audio and video precisely -- maybe a little longer or a little shorter -- but the same, and so one of our clients, for example, is suing on the song *Smile* because they wrote the song *Smile*. And a copyright lawsuit is about centrally the plaintiff's work which is being sued about, and the plaintiff comes into the court and says, "You're copying this work." The fact that they are continuing to copy the work is, of course, always relevant to injunctive relief at a minimum, and also to the questions of control, and to the question of willful blindness.

If they have our works that we've already sent them take-down notices for, and they're identifying those works so precisely that they are matching advertisements to them or collecting all of these x-ray dog songs, for example, into channels that they are finding, our submission is -- and nothing that the Second Circuit or this Court has indicated is to the contrary -- that that will allow a jury to find control plus sufficient to defeat the safe harbor or willful blindness because if they can find it for purposes of matching an ad or putting in a channel, then they're consciously avoiding that knowledge by pretending that they don't know it's there for copyright enforcement purposes.

MR. SCHAPIRO: Your Honor, Mr. Sims has again used the word works in suit at every turn, but these are different --

THE COURT: Mr. Schapiro, I want to understand what counsel is saying, but I don't want it to derail some other important questions we have to discuss. If I try to carry too many points in my mind when I should be thinking about the major things, I will not do a good job on either -- the major or the minor things.

I think that deferring on these small issues for the moment, Mr. Sims, you raised the question or you bring tacitly -- there was a suggestion in I think some of your correspondence, but certainly in some of the correspondence, that the Premier League action you thought might be decoupled from this action and possibly deferred until the outcome of, I guess, the motions or if you have litigation to final judgment of this action.

Do I misunderstand that that suggestion was floated; And, if so, what is your present thinking about it?

MR. SIMS: Your Honor, it had been our view months ago that if the discovery we wanted would have made a trial on the schedule that Viacom is seeking impossible, we might have stepped back. As we now think about it, looking at the small amount of what we want and the development of the theories on both sides in the briefing, I guess our position now is we don't think that the small amount of discovery we want ought to have that impact. So, we're not looking to be decoupled. We would have acquiesced in it if necessary, but I don't think

it's something we're looking for.

THE COURT: Isn't a consequence of that position that we should consider whether the motion for class certification should or should not be addressed before the motions for summary judgment?

MR. SIMS: Your Honor, for the same reasons why the Court didn't address the class certification before, our view is that the briefing on the merits on their summary judgment motion -- not really the merits, but a defense -- would be much --

THE COURT: It can hardly be for the same reason because the last time the reason was I was dismissing all those portions of the case in which the class then would have had any viable interest. That mooted the certification question.

MR. SIMS: Yes.

THE COURT: You don't want to argue that reason, I don't think.

MR. SIMS: We do think that the crystallization of the issues presented by the Second Circuit can most efficiently happen; and, frankly, we read the Second Circuit's decision as implying that the Court should turn as the first order of business to the summary judgment motion that certainly --

THE COURT: I don't see any such direction.

MR. SIMS: Well, they use the word expeditiously. They assume that it would go forward right away.

(Pause)

MR. SIMS: The other point, your Honor, is that the decision that you make on the merits of their defense will really shape how we would want to pitch class certification or not so that in some ways that becomes an issue which is a lot easier to handle once there is more clarity on what the scope of these defenses is. So, our suggestion would be that we all work hard on their summary judgment motion and turn to --

THE COURT: Well, I thought you were going to pass on it.

MR. SIMS: No, Mr. Schapiro is not going to pass. He's going to move for summary judgment, and our position would be that in the course of deciding that, it will be a lot easier and there will be much more focused briefing on class certification than there would otherwise be.

THE COURT: Mr. Schapiro?

MR. SCHAPIRO: Your Honor, we set forth our position on this in our letters. We think that contrary to what Mr. Sims has just said, that whatever decision your Honor would ultimately make on summary judgment, no class can be certified here, and that that is going to be the ultimate ruling.

It's within your Honor's discretion to decide, I think, what's the most efficient way to order it, but as we stated in our letters, we thought that it's ripe for consideration now and that that would be efficient.

MR. BASKIN: Your Honor, may I just be heard?

THE COURT: Sure.

MR. BASKIN: I enjoy being a bystander, by the way.

THE COURT: Excuse me?

MR. BASKIN: I said, I enjoy listening to others argue. It sharpens my skill set.

I don't care, your Honor, whether -- happy to brief summary judgment in conjunction with the class; happy to decouple them if that becomes necessary; and, yet, as your Honor knows, these actions are not consolidated. We were careful not to do that precisely because we do not want, obviously, the class's action to slow us down. As long as we can work in tandem, that's fine. If summary judgment proceeds in tandem, that's fine with us. If you want to go a different way, that could be worked out between you and the other parties, but our goal is to have our matter, which has been here awhile, to proceed to trial as rapidly as possible. And these are not, as I said, consolidated lawsuits intentionally for that reason because we understood there someday might be a need to decouple the lawsuits once discovery got completed.

THE COURT: So, in short, your position is you'd like your trial as quickly as possible.

MR. BASKIN: Exactly, your Honor. Once your Honor rules on summary judgment --

THE COURT: And you are in disfavor of anything that

might slow it down.

MR. BASKIN: Correct.

THE COURT: OK. I got that.

MR. SIMS: Your Honor, in just recalling the class certification briefing, it was full of the merits, and it was full of different branches of the merits because it was unclear which of their many directions the Court might go with respect to what these various defenses mean, what the elements of them mean. So, it would really be much more efficient and certainly much less likely to delay things if the class certification briefing were to happen afterward. If the Court were insistent on class certification earlier, I would actually want to talk to my clients about decoupling. Maybe at that point it would make more sense, but I don't have an answer now because I would need to talk to clients about it.

THE COURT: Well, when you talk to them about decoupling, I would suggest that that concept does raise other issues on which you would take a position after consideration, such as whether the whole case is stayed or whether any discovery in it should continue, and about whether the motions for certification should be stayed or should be decided before any treatment about decoupling because after the motion for certification is made, there might not be any class to worry about, which, again, goes back to whether the certification motion should be made before the renewed summary judgment

motion.

Seeing it abstractly -- because that's the only position I'm able to function in; I don't know enough about the considerations to see it any other way -- an observer such as myself would take note of the federal rules' preference that the class questions be decided promptly and near the outset of the litigation, which has now gone through one summary judgment and a trip to the Court of Appeals, and it's facing another round, one might say isn't it about time we knew whether there was a class or not.

Logically, there is a good deal of sense, it seems to me, that before embarking on summary judgment briefing and the great amount of work that involves, it might be useful to know whether there was a class or not. And that may also involve a certain amount of public interest that the facilities of all the counsel and the Court are not wasted on debating questions which are moot if there is no class. And, frankly, on the presentations of the parties and the review of the briefs on the certification submitted the last time around, the motion to not certify the class is non-frivolous.

MR. SIMS: Your Honor, the one thing that's come to mind while you were speaking is that as you may or may not know, in one of the Google Books cases, Judge Chin, acting as the District Court, did certify a class, and Google took that decision on a permissive interlocutory appeal. They applied

for an interlocutory appeal to the Circuit, and the Circuit granted review of that, quite unusually.

So, pending now, and being briefed sometime in the future, I don't know whether you know the schedule or not, is exactly the question of class certification in a copyright case, and there are a lot of similarities. So, the fact that the Circuit is in the midst of thinking about that problem and will come up --

THE COURT: Is the class sought to be certified in that case similar to the class sought to be certified here?

MR. SIMS: It's a case in which Google copied millions of books, and the plaintiffs are authors claiming that their books were copied. Judge Chin, in a very interesting decision and acting as a district court Judge -- although he was already on the bench -- did certify, but on the other hand, quite unusually, the Circuit has agreed to hear that. So, it may well be that it would make more sense to get the Second Circuit's views and controlling decision on that very subject.

THE COURT: Well, but would it be controlling?

MR. SIMS: Well, I would think that what the Circuit would have to say about class certification in a copyright case where the plaintiff class are various copyright holders would be, if not controlling, certainly highly influential and useful, and by far the leading authority on that.

THE COURT: Well, this case arises under the Digital

Millennium Copyright Act. Was that act involved in Judge Chin's case?

MR. SIMS: No, but both cases are fundamentally copyright infringement case. The DMCA does present a defense, to be sure, whereas the other case I think is not a DMCA case, but the Circuit has never written about copyright infringement class actions before. As I read the application for the interlocutory appeal and the apposition, I do think that whatever the Court says there will be highly meaningful here.

THE COURT: Look, inherent in the concept of the class in this case is that they all have similar rights arising out of a rather broad construction of the concept of notice. That invokes the Digital Millennium Copyright Act, and I don't think you can sensibly consider class coherence or even the existence of the class's right without looking at the Digital Millennium Copyright case; and a case that decides general copyright law without attention to this particular subsection of statutory modification of the matters subject to that act, I don't see how it could be controlling. It might be interesting. Anything the Court of Appeals says in the area is interesting, but the process of controlling seems to me a long way away.

If I allowed you to speak, Mr. Schapiro, what would you say?

MR. SCHAPIRO: I would say your Honor that the Books case is a totally different case, as your Honor -- I was rising

to point out what your Honor already said; that was why I sat down again. This is a Digital Millennium Copyright Act case, the case before your Honor. The Books case has nothing to do with that. It is certainly the case that various Courts of Appeals, including our own, may be considering various cases that bear in one way or another on issues of class certification at any given time, but it is not going to be determinative of the outcome of this case.

What we think probably will be determinative here is the U.S. Supreme Court's intervening decision in the *Walmart v. Dukes* case, which I think makes the bar a lot higher for the plaintiff to get over.

THE COURT: Yes, you put great weight on that in your correspondence, it drove me to read it. What do you see as its application to this case?

MR. SCHAPIRO: When we went through the first round of class certification briefing, the class rested its arguments primarily on the suggestion that the issues in this case were generalized issues that could be decided in a generalized way, and they were able to make those arguments because the Court of Appeals had not yet ruled in this case that the type of knowledge required is knowledge of specific infringements. And Wal-Mart --

THE COURT: The individuals whose employment was individually affected by the practices.

MR. SCHAPIRO: Correct, your Honor. Well, so *Wal-Mart v. Dukes* now makes clear that where you have a need for individualized inquiries of a nature that I think are plainly present here after we view this case in light of the Second Circuit's interpretation of this case, that you can't certify a feasible class.

Whatever class certification briefing happens, whether it's now, as we think it should be, or down the road, we think it could be done very simply and efficiently by simply supplementing the briefs that the parties put in originally with an additional submission that takes into account intervening law, whether it's *Wal-Mart v. Dukes* or the Books case or anything else that either party wants to cite and the Second Circuit's reading of the DMCA as it applies here. That would be a very efficient way to go forward and decide class certification if the court agrees with the position that we've taken about the timing.

THE COURT: What were your last two words?

MR. SCHAPIRO: Pardon me?

THE COURT: What were your last two words?

MR. SCHAPIRO: If the Court agrees with us with the position we've taken about timing of class certification.

THE COURT: You think it's about time, is that what you said.

MR. SCHAPIRO: I didn't say that, but I think that. I

said about the timing.

THE COURT: I see.

(Pause)

THE COURT: Let's go back for a moment to the topic of syndication, not because I particularly want to discuss syndication, but because it illustrates -- I guess it's a dilemma that's hard to -- I don't know the right word -- in my thinking that affects a great deal of the management of this case, and I think it really has to be discussed with counsel and probably now.

The reason that the question about syndication comes up is because counsel don't know which way I would interpret what the Court of Appeals said on the topic. Whether the clips in issue are restrained, restricted to those that were manually handled or, as the plaintiffs put it, that syndication is syndication and the way it was done is immaterial to the thought and the outcome of the claim. That issue is one that obviously it would be useful to have any thinking on at around this stage of the case; and that is also true about the great question about the degree of specificity required to be applied to such evidence as the Karim memorandum or willful blindness -- and let me pause, I'll come back to willful blindness -- and the other topics left open for re-visitation by us all after the Court of Appeals' opinion.

With that, I think out of the Karim memorandum, as

analogously involved in the willful blindness considerations, it presented the fundamental question: Willful blindness to what? Karim's memorandum gave notice of what? In each case there is a desire by the plaintiffs to say, well, it gave notice to infringements in concrete matters at the minimum, and, therefore, the defendants were willfully blind or were informed by Karim to the specific titles that were being infringed, and all they had to do was go and take it down. I may be oversimplifying it, but that thought runs through the plaintiff's submissions in the case.

The defendants say, oh, no, it's well and good to say, as Karim did, "clips of the following well-known shows can still be found: Family Guy, South Park, MTV, Cribs, Daily Show, Reno 911, The Dave Chappelle. This content is an easy target," and so forth.

The plaintiffs say, well, there you are, there's the name of the show and the confession or claim that it's riddled with infringing matter; take it down.

But if there were to be a conversation by the recipients of the Karim memo with Mr. Karim, you might think it would go along something like this: "Well, Karim, we agree with you; we understand what you say. Tell us where those clips are located, and we'll take them down."

And he says, "Oh, gee, I found them browsing. They're all over the place. It's stuff we ought not to be showing."

My point is, the language in the memo, rather likely notices to which the class plaintiff's point, is perhaps not as specific as a quick reading of it might make it appear. The Court of Appeals said, "A reasonable juror could conclude from the March 2006 report that Karim knew of the presence of Viacom-owned material on Youtube, since he presumably located specific clips of the show in question before he could announce that Youtube posted the content 'as of today.' A reasonable juror could also conclude that Karim believed the clips he located to be infringing (since he refers to them as 'blatantly illegal'), and that Youtube did not remove the content from the web site until conducting 'a more thorough analysis.'"

Well, this leaves a point that is quite central to the case following remand: Is Karim's memo sufficiently specific to impose a duty to locate the actual clips that Karim located, and their brethren, and take them down or does it require further steps before those specific locations can be made that is the specific location the statute talks about.

I read your submissions very carefully. I thought about it a great deal, as you would expect me too, and I formed at least preliminary views on what the proper rule should be. On the other hand, that brings me to the dilemma. My dilemma is, I'm not only not in, I'm forbidden to enter upon, the business of giving advisory opinions, and yet I feel it would be helpful in this case in some way, but there are other

considerations: Proper procedure, proper presentation of positions for appeal and perhaps the paramount benefits of following a well-worn procedural path so people know what to expect, but I share with you my view that most of these questions that are presented turn on that concept or its close brothers or cousins in this record. And I would like your thoughts on what the best way is to proceed.

That brings me back to the specific question of syndication because this also runs through the presentations on summary judgment. I can't really tell you which of the views of the scope of discovery and what is in issue in syndication without understanding more about what syndication is. You all know, but I don't, and in looking in the proposed factual submissions of the parties on the motions, I'm not given the kind of wisdom about what syndication is, that would help me to understand the issues about manual or electronic management.

Now, of course I can read the Court of Appeals' opinion and try to analyze what the judges had in mind in their selection of words, but the process is healthier on the whole if I give respect to their words but approach the question of what is the proper rule with respect to syndication on a better understanding of syndication and an independent analysis of what should be done bearing in mind what they said about it.

I might conclude by saying you see that briefing has been too conceptual, it's not been anchored enough in the

evidence about the clips in suit to allow the kind of discriminating ruling that the case deserves. That leads me to think that on the briefing on the motions for summary judgment there should be, at least in form of an appendix, a statement for each clip or work in suit. What precise information was given to or reasonably apparent to Youtube identifying the location or cite of the infringing matter? And how does that information square with the requirements of the statute?

And a second statement: What would Youtube have to do in addition to locate and remove the infringing matter, disregarding the use of its own non-standard resources, because the Court of Appeals, I think, excluded those. It's that type of concrete information which would allow well-based, even if wrong, determinations you have asked of the legal status of that claim.

So I throw myself on your mercy. What do you want me to do?

MR. SCHAPIRO: Your Honor, we would be prepared to go ahead and submit --

THE COURT: Let me just refer to the words of the Court of Appeals on willful blindness. The holding is concisely stated: "Because the statute does not speak directly to the Willful Blindness Doctrine, Section 512(m) limits, but does not abrogate the doctrine. Accordingly, we hold that the Willful Blindness Doctrine may be applied in appropriate

circumstances to demonstrate knowledge or awareness of specific instances of infringement under the DMCA."

One may well ask, and Mr. Sims will be happy to answer, how that language opens the field delineated by Mr. Karim to successive generations of works submitted that should have been caught by those reading Mr. Karim's memorandum. I think he has his work cut out for him, but he's very, very able.

Mr. Schapiro?

MR. SCHAPIRO: So, your Honor, we will, of course, follow whatever guidance the Court has. We would be prepared to move to summary judgment briefing and to include whether it's as an appendix or just as part of the briefing, answers to the two questions that your Honor posed.

THE COURT: Well, in your view they are two short answers: None. Second answer: None.

MR. SCHAPIRO: You're right about that, your Honor. But we think they're the right questions also, it won't surprise you to learn. And we could meet and confer with the plaintiffs to come up with a schedule that seems workable. We're more than happy to have it be a short schedule. I think the question is still before the Court about class certification because the parties have made their positions clear.

THE COURT: I think that the correct answer is it

probably ought to be now.

MR. SCHAPIRO: OK.

THE COURT: I wouldn't want to rule finally without giving -- I don't want to take anybody by surprise. If that's a wrong conclusion, so inform me in the next ten days in writing, and I'll reconsider it. But it seems to me we've reached a stage in the case where all other things are equal enough that it's time now to bite that bullet in this case. I won't force you to answer now. I want to keep it tentative. I'm not doing these things off the cuff. I've thought about them.

MR. SIMS: I understand.

Did I understand you to be asking over the last 20 minutes or so whether or not we all, or any of us, thought it would be useful in some way to get your preliminary views? Was that a question you were propounding to us, or did I miss hear it?

THE COURT: Yes, it was. Yes, it was. But in suggesting it, I have a feeling that these questions are so critical to the case as it stands that those views ought not to be delivered until after whatever further submissions the parties want to make, and in a form which I've not been able to construct myself, which makes them effective as rulings that can be appealed because thereafter they're going to have a great effect on the positions that people can legitimately

expect to survive.

MR. SIMS: I, for one, would find it useful if we could adjourn for five minutes, and Baskin and I could talk about this. I don't think it's necessarily impossible to find a way for you to do that, and it would be helpful to all the parties, but I'm not sure -- it would be helpful if we can briefly confer on the question and then tell you what we think, or not.

THE COURT: Sure. Adjourn for five minutes or for several days.

MR. BASKIN: I don't need several days, your Honor.

THE COURT: Excuse me?

MR. BASKIN: I'm pretty confident we don't need several days. I'm not sure we need five minutes. As your Honor said in the course of some of your discussion, I think it's imperative that this be placed in a proper procedural context to protect the parties' rights to appeal. Obviously, we're going to be making a very copious record on summary judgment with respect to what we think the proper reading of all of the issues, not just actual notice, but willful blindness and the other issues are as well. We look forward to making that record. I'm highly confident either your Honor will agree with us or you won't. And if you agree with us, the case will proceed. If you don't agree with us, we'll take it up on appeal, but I think it's important that we not delay any

longer, and I think we should give you a record that's concrete. You'll give us your best learning, your best judgment on the rules and how you interpret these various principles, and then, as I said, either the case will proceed in an orderly fashion to trial or will proceed to an orderly fashion on appeal, but I think there's no purpose in deferring or doing any intermediate steps. I think we're all entitled to make our proper record, and I'm sure your Honor respects that as well.

So, my proposal would be, your Honor, that I would propose -- but I think that since we've already, or a lot of us, obviously have researched it, we've briefed a lot of the issues as part of our preliminary showing to you, I would propose that we proceed on the following basis: That Mr. Schapiro file his opening brief by November 16, which is a little more than a month. I will respond by December 17 or 16, also a month. He could reply by January 8 or so, which would be three weeks. And then your Honor will have a record in front of you that is specific and concrete. You can rule. If you rule with us, as I think you should, then we could head towards a trial roughly in July of 2013. If you rule against us, we will take an appeal as quickly as we can and get the case righted, but I think it's important, your Honor, that we not -- we get out of this sort of procedure we have where a proper record that is not being made. I don't think it's fair

to the parties for a proper record not to be made.

MR. SCHAPIRO: We agree in concept. I think the schedule is a little bit aggressive when I know what other people's schedules and obligations are. I'm sure if we meet with Baskin and adjust it by a couple of weeks, we could do that. There are a lot of clips involved.

MR. BASKIN: That will be fine, your Honor. We can meet and try and adjust it a couple of weeks, as long as we are on an orderly path.

THE COURT: That's fine. A lot of what I was saying was a plea for more concrete discussions informed by the facts and procedures taken by the parties on what was done and not done, and up until now it's been very much in terms of categories of documents and assertions that are not clear on what exactly they cover and what they don't. Although they're clear intellectually, they're not clear in the way that normal summary judgment motions are, and I need that -- for example, I need a much more clear description of why the plaintiffs think that the tracking process gave knowledge to the defendants that they didn't have before. I've puzzled it out, and I think there may be a derivative way that it could have been derived from what was going on. Maybe that's the meaning of the argument, but I need these things clearly. In this case after so much to deny summary judgment on the grounds that perhaps it isn't clear enough would really be a waste of time.

Well, then I will expect that. You did not set a date for briefing the class certification motion, Mr. Schapiro, or -- well, you have no concern with it.

MR. SCHAPIRO: We would probably want to confer with Mr. Sims, but we could come up with a schedule as well that would be a fairly quick one. Is your Honor amenable to --

THE COURT: A lot of it is in the briefs as of the date they spoke.

MR. SCHAPIRO: Yes. Would your Honor endorse the proposal which would be to resubmit briefs that were submitted earlier with supplements updating legal developments including the Second Circuit's ruling in this case?

THE COURT: Sure. You don't even have to submit them. I have copies of them.

MR. SCHAPIRO: Even better. I think we can do that fairly quickly, and we'll just touch base with Mr. Sims. How about we put in a letter to the Court detailing where we are with scheduling within the next seven days? And we can tell you what schedules we've worked out between the parties.

THE COURT: Sure.

MR. SIMS: Your Honor, as I understand it -- we're glad to do that, but I understand that we are also left to consider whether we think decoupling was a good idea -- is a good idea or not. So, in the context of having the discussion with Mr. Schapiro, we're going to address that with our clients

as well.

THE COURT: Yes. And I will pray for some detail as to what the word decoupling really entails.

MR. SIMS: Means. As in everything in this case, it requires more specificity.

THE COURT: Obviously, there are various weights and measures to be taken, but your preference in that would be useful. OK. Thank you all very much.

(Adjourned)